

Defendant Clifford Wright was indicted on two counts of first degree murder. The State is seeking the death penalty. The State intends to present the testimony of R. Stephen Mardigian as an expert in violent crime scene analysis.

Defendant has moved to exclude Mardigian's testimony. Defendant argues that Mardigian's conclusions are not crime scene analysis, but rather criminal profiling. The State presented Mardigian during a hearing before the Court on August 18, 2009. The State and defense counsel questioned the witness. The Court heard additional oral argument regarding admissibility on September 2, 2009.

In *State v. Pennell*,¹ the Delaware Supreme Court allowed the testimony of an expert on crime scene analysis. Specifically, the expert testified as to whether three murders were committed by the same person. While the trial court permitted the expert to testify as to the "signature" aspects of the crimes, the trial court did not allow the introduction of "profile" evidence.

This motion presents an issue of first impression in Delaware. The crux of the question is whether the testimony proposed by the State is "profiling" or "violent crime scene analysis." Expert violent crime scene analysis testimony may be admissible if it passes muster under Delaware Rule of Evidence 702 and the

¹602 A.2d 48 (Del. 1991).

*Daubert*² analysis. Profiling testimony is not admissible evidence. The first dilemma is defining “profiling” and “violent crime scene analysis.” The second determination is whether Mardigian’s testimony, or a portion of his testimony, may be admitted into evidence.

“Profiling” or “Violent Crime Scene Analysis”

“In the case of every horrible crime since the beginning of civilization, there is always that searing, fundamental question: what kind of person could have done such a thing?”³ Beginning in the late nineteenth century, “theorists have attempted to predict criminality based on physical, mental, and psychological attributes.”⁴ One purpose of profiling and violent crime scene analysis is to assist law enforcement in focusing investigations and to suggest proactive techniques that might help to draw out the perpetrator.⁵ Profiling and crime scene analysis also have been used to obtain search warrants on the basis of behavioral evidence.⁶

²*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

³JOHN DOUGLAS & MARK OLSHAKER, *MINDHUNTER* 26 (1995).

⁴James Aaron George, *Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results?*, 61 *Vand. L. Rev.* 221, 225 (2008) (citing JOHN DOUGLAS ET AL., *CRIME CLASSIFICATION MANUAL: A STANDARD SYSTEM FOR INVESTIGATING AND CLASSIFYING VIOLENT CRIMES* 3-8 (2d ed. 2006)).

⁵DOUGLAS & OLSHAKER, *supra* note 3, at 31.

⁶*Id.* at 246 (for example, cases involving Robert Hansen in Alaska and Steven Pennell in Delaware).

The analyses attempt to answer three questions: *what* took place; *why* did it happen the way it did; and *who* would have committed this crime for these reasons?⁷ Former head of the Federal Bureau of Investigation Behavioral Science and Investigative Support Units, John Douglas, describes his methodology:

The fact of the matter is, profiling and crime-scene analysis is a lot more than simply inputting data and crunching it through. To be a good profiler, you have to be able to evaluate a wide range of evidence and data. But you also have to be able to walk in the shoes of both the offender and the victim.

You have to be able to re-create the crime scene in your head, you need to know as much as you can about the victim so that you can imagine how she might have reacted. You have to be able to put yourself in her place as the attacker threatens her with a gun or a knife, a rock, his fists, or whatever. You have to be able to feel her fear as he approaches her. You have to be able to feel her pain as he rapes her or beats her or cuts her. You have to try to imagine what she was going through when he tortured her for his sexual gratification. You have to understand what it's like to scream in terror and agony, realizing that it won't help, that it won't get him to stop. You have to know what it was like.⁸

Courts consistently have declined to admit expert testimony that compares a specific defendant to a general profile. However, many courts have permitted expert testimony that compares a defendant to a profile developed from crime scene analysis. As a general rule, expert testimony that opines as to certain traits

⁷*Id.* at 36.

⁸*Id.* at 173.

or behavior of a perpetrator, but is not based on crime scene analysis, is not admissible.⁹

State v. Pennell¹⁰

“Modus operandi,” or MO, is learned behavior. MO is the conduct necessary to commit the crime. Such actions may vary from crime to crime committed by the same defendants. The “signature” aspects of a crime are what the perpetrator does for fulfillment. Signature behavior is static and does not change.¹¹

In *Pennell*, Federal Bureau of Investigation (“FBI”) profilers prepared an affidavit leading to a search warrant. Mardigian also worked on the *Pennell* case, and produced a profile for the New Castle County Police Department and the Delaware State Police to assist in narrowing the focus of the investigation and developing a proactive strategy. The profile suggested a white male, in his late twenties to early thirties, employed in one of the construction trades, driving a high-mileage van, cruising excessively for victims, exhibiting a macho image, having an ongoing relationship with a wife or girlfriend, enjoying dominating

⁹George, *supra* note 4, at 241.

¹⁰602 A.2d 48 (Del. 1991).

¹¹DOUGLAS & OLSHAKER, *supra* note 3, at 251.

women, bringing his weapons of choice with him, destroying weapons after the crime, familiar with the area where he disposed of bodies and evidence, emotionally flat during the crimes, and likely to continue murdering until caught.

As it turned out, Steven Pennell fit the profile very closely. He was a thirty-one-year-old white male, worked as an electrician, drove a van with high mileage, cruised excessively looking for victims, exhibited a macho image, was married but enjoyed dominating women, had a carefully prepared “rape kit” in his van, attempted to destroy evidence, was familiar with the area of the disposal sites, was emotionally flat during the crimes, and killed repeatedly until he was apprehended.¹²

There can be little question that without the profiling assistance, Pennell might not have been caught, or at least would not have been stopped when he was. The profile enabled law enforcement to use extremely courageous female police officers, posing as prostitutes, to engage in conversation with persons consistent with the profile. While pretending to haggle with Pennell over the price of her services, one police officer was able to use her fingernails to scrape carpet fibers from the door jamb of Pennell’s van. Those fibers matched evidence previously

¹²*Id.* at 252-53.

obtained from one of the murder victims and the evidence was crucial to Pennell's arrest and conviction.¹³

However, during Pennell's trial, John Douglas (who also worked on the case) was not permitted to testify as an expert as to the profile. Rather, the trial court limited his expert testimony to the "signature" aspects of the case. Signature was intended to demonstrate that the three murders were committed by the same person. Douglas testified that, while the MO varied, the signature did not. The signature common denominator in each case was the extremely unusual physical and sexual torture, and the apparent satisfaction the murderer received from inflicting pain.¹⁴ The methods of torture - the MO - varied according to the instruments and bindings used.¹⁵

The trial court held that the admissibility of Douglas' opinion was governed by Delaware Rule of Evidence 702. At that time, DRE 702 provided:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

¹³*Pennell v. State*, 602 A.2d 48, 50 (Del. 1991).

¹⁴*Id.* at 52.

¹⁵DOUGLAS & OLSHAKER, *supra* note 3, at 253.

The court found the expert’s extensive experience with signature crimes and crime analysis to be “specialized,” and the expert’s knowledge was not possessed by the average trier of fact. However, the court declined to admit the profile evidence, which attempted to link general characteristics of serial murderers to specific characteristics of the defendant.¹⁶

*Floray v. State*¹⁷

In the only other pertinent Delaware case, this Court refused to allow expert testimony offered by the defense. In *Floray*, the proffered testimony concerned the susceptibility of young children to be programmed to falsify abuse information about fathers in hostile custody and visitation situations. The expert also proposed to testify that the defendant did not fit the psychological profile of a pedophiliac.¹⁸

The Court found that the proponent of the expert failed to establish any behavioral evidence that the jury would need assistance to understand.

The use of expert evidence in child sexual abuse prosecutions is limited “to assist the finder of fact, whether judge or jury, in evaluating the psychological dynamics and resulting behavior patterns of alleged victims of child abuse, where the child’s behavior is not within the common experience of the average juror.” In such a case, expert testimony must be “given in general terms and directed to

¹⁶*Pennell*, 602 A.2d at 55.

¹⁷720 A.2d 1132 (Del. 1998).

¹⁸*Id.* at 1134.

behavior factors in evidence [and may not attempt] to quantify the veracity of a particular witness or provide a statistical test for truth telling.” The purpose of the expert testimony is only “to provide the trier of fact with background concerning the behavior of the alleged child abuse victim based on the expert’s experience and training so that the jury or judge, may place the child witness’ testimony in a behavior context.¹⁹

Proffered Expert Testimony

The State wishes to present the testimony of R. Stephen Mardigian as an expert in the field of violent crime scene analysis. Mardigian is an Executive Vice President and Violent Crime Consultant with Academy Group, Inc. (“AGI”) of Manassas, Virginia. AGI is a privately-owned forensic behavioral science firm. The State asked Mardigian to determine what, if any, conclusions he might be able to draw about the murderer’s motivation for the crimes, the amount of planning, what (if any) steps the offender took to avoid detection, and what (if any) relationship existed between the offender and victims. Mardigian was not asked to opine as to whether defendant (or any other particular person) was responsible for the crimes.

Mardigian stated in his report that his opinions are based upon a review of the materials submitted by the State and are the result of the knowledge drawn from personal investigative experience, educational background, and research, as

¹⁹*Id.* at 1335 (quoting *Wheat v. State*, 527 A.2d 269, 275 (Del. 1987)).

well as 31 years of active law enforcement experience. Mardigian's experience includes 11 years as a Field Special Agent with the FBI conducting investigations involving diverse violent crime matters, followed by 13 years as a Supervisory Special Agent assigned to the FBI's National Center for the Analysis of Violent Crime (NCAVC), FBI Academy, Quantico, Virginia, as a Violent Crime Analyst and Criminal Profiler. Throughout his career, Mardigian assessed hundreds of violent crime cases for law enforcement agencies nationwide, including: homicide, rape and sexual assault, child abduction and molestation, arson, bombing, extortion, product tampering, stalking, workplace violence, domestic and international terrorism, and threat assessment.

Mardigian described his task as follows:

A violent crime analysis of this matter was initiated to identify the motivation for the crime, the degree of criminal sophistication displayed by the offender, how much planning went into the commission of the crime, what steps the offender took to avoid identification, and what the relationship was between the offender and the victims. The analysis includes an assessment of the location of the crime, the location of body disposal, an evaluation of victimology and an assessment of the injuries sustained by the victims.

The process of conducting a Violent Crime Analysis involves a methodology that is similar to that traditionally used by law enforcement officers during the course of their investigations.

The resulting report reached the following conclusions:

- Overall, the circumstances, based from review of the facts of the case taken in totality, allow me to opine that these murders were not random or opportunistic.
- It is also my opinion that this is not a stranger-related homicide. These deaths were caused by someone known to the victims.
- It is opined that the offender exhibited “OVERKILL” during the commission of these murders inasmuch as each victim’s body showed signs of considerably more trauma that was actually necessary to end life. Such conduct indicates personalized anger and sustained aggression (rage) on the part of the offender. Such behavior is consistent with an offender who knows their victims.
- A stranger would not be expected to have the need to spend the considerable amount of time and effort exhibited carefully cleaning-up the scene, preparing the bodies for removal and locating an isolated disposal site for concealment to delay discovery.
- The way the bodies were found supports the opinion that this offender displayed a need to create the appearance that the victims were gone from [crime scene 1]. The offender’s extensive efforts potentially exposed the offender to greater risk as additional time and activity at crime scenes can elevate the potential exposure to being observed or connected to the crime.
- The need to move, hide, and destroy the victims’ bodies also may suggest the offender was concerned that law enforcement officials would be knocking on the offender’s door and therefore needed time to distance himself from the crime and potentially establish an alibi.
- Based upon a reasonable degree of certainty within the field of Violent Crime Analysis, the actions of the offender, given the

nature and severity of these murders (demonstrated by the interpersonal aggression which resulted in the death of both victims) it appears evident these victims were selected by the offender, likely as a result of some underlying emotional conflict that propelled the offender to kill. The targeting is supported by the evidence of awareness demonstrated by the offender at the crime scene and the overkill engaged at the crime scene.

DISCUSSION

In *Pennell*,²⁰ the Delaware Supreme Court affirmed the exclusion of expert profiling testimony, and upheld the admissibility of expert crime scene analysis testimony. In that case, the distinction was relatively clear. The profiling evidence suggested specific traits of the murderer - such as gender, race, age, trade, type of automobile, relationships with women. The admitted expert testimony was limited to “linkage,” or the “signature” aspects of the crimes. In other words, the expert opined that three murders were committed by the same offender, based upon the sadistic manner in which the victims were tortured and the methods by which they were killed.

This case presents an issue of first impression in Delaware. Linkage is not relevant in this case. According to Mardigian, linkage analysis is an attempt to interrelate the facts of two or more independent crimes to determine whether the

²⁰*State v. Pennell*, 602 A.2d 48 (Del. 1991).

same offender may have been responsible. In contrast, profiling is a development of characteristics or traits relevant to a specific offender (such as race, ethnicity, age, personality features, occupation), whether the offender is known or unknown.

The State argues that Mardigian's testimony is admissible crime scene analysis. The defense contends that the expert's opinion is profiling, and should be excluded.

The Court will focus on the substance of the proffered evidence. The terms "profiling" and "crime scene analysis" often are used interchangeably. Semantics and titles cannot be outcome determinative.

Profiling and crime scene analysis are not mutually exclusive. The analyses are overlapping and utilize virtually identical methodologies to a certain point. During the September 2 hearing, Mardigian testified that the FBI's criminal investigative process begins with crime analysis and an interpretation of the apparent crime scene behavior. "Violent crime analysis also can be carried on to identify the profile....Even though it's a component of the same analytical process, [profiling is] a separate issue, separate factor."

Delaware Rule of Evidence 702: Admissibility of Expert Testimony

Delaware Rule of Evidence 702 governs the admissibility of expert testimony and permits the presentation of "scientific, technical or other specialized

knowledge” if it “will assist the trier of fact to understand the evidence or to determine a fact in issue.”²¹ To be admissible, the testimony must be (1) based upon sufficient facts or data; (2) the product of reliable principles and methods; and (3) the witness must have applied the principles and methods reliably to the facts of the case.²²

D.R.E. 702 is substantially similar to Federal Rule of Evidence 702. In *M.G. Bancorporation v. LeBeau*,²³ the Delaware Supreme Court followed the United States Supreme Court’s interpretation of F.R.E. 702 in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁴ In *Daubert*, the United States Supreme Court held that F.R.E. 702 requires trial judges to ensure that all expert testimony is not only relevant, but reliable.²⁵

To fulfill the role of gatekeeper, the trial judge must determine whether:

1. the witness is qualified as an expert by knowledge, skill, experience, training or education;

²¹D.R.E. 702.

²²*Id.*

²³737 A.2d 513, 521-22 (Del. 1999).

²⁴509 U.S. 579 (1993).

²⁵*Id.* at 589.

2. the evidence is relevant and reliable;²⁶
3. the expert's opinion is based upon information reasonably relied upon by experts in the particular field;
4. the expert testimony will assist the trier of fact to understand the evidence or to determine a fact in issue; and
5. the expert testimony will not create unfair prejudice or confuse or mislead the jury.²⁷

A trial judge must determine whether an expert's testimony has a reliable basis in the knowledge and experience of the relevant discipline.²⁸ Just because an expert is qualified in a field does not automatically make the opinion reliable.²⁹ Expert knowledge requires more than unsupported speculation.³⁰ The trial judge must determine whether the expert, though qualified, can produce a sufficiently informed opinion that is testable and verifiable.³¹ Only after the trial judge determines that the expert proffers a "relevant, reliable, validated, and, therefore,

²⁶*Id.* at 590-94.

²⁷*Bowen v. E.I. DuPont de Nemours & Co.*, 906 A.2d 787, 795 (Del. 2006)(citing *Tolson v. State*, 900 A.2d 639, 645 (Del. 2006); *Eskin v. Carden*, 842 A.2d 1222, 1227 (Del. 2004)).

²⁸*Id.* at 784.

²⁹*Eskin*, 842 A.2d at 1228; see *Goodridge v. Hyster Co.*, 845 A.2d 498, 503 (Del. 2004).

³⁰*Daubert*, 509 U.S. at 590.

³¹*Eskin v. Carden*, 842 A.2d 1222, 1228 (Del. 2004); see also *Daubert*, 509 U.S. at 593 (whether a theory or technique will assist the trier of fact as scientific knowledge will often rely on whether it can and has been tested).

trustworthy” opinion, can the expert offer the opinion to the jury and be subject to cross-examination.³²

The *Daubert* Court provided a nonexhaustive list of factors for trial judges to consider in determining whether expert testimony is sufficiently reliable:

1. whether a theory or technique can or has been tested;
2. whether it has been subjected to peer review and publication;
3. whether a technique has a high known or potential rate of error and whether there are standards controlling its operation; and
4. whether the theory or technique enjoys general acceptance within a relevant community.³³

Expert Qualifications

It is not seriously disputed that Mardigian is qualified as an expert in violent crime scene analysis based upon his knowledge, skill, experience, training and education. Mardigian served 31 years as an FBI Supervisory Special Agent, regional field office program manager, violent crime assessor and administrator for the FBI’s National Center for the Analysis of Violent Crime (NCAVC). He has conducted detailed evaluations of violent crime cases to assist criminal justice

³²*Potter v. Blackburn*, 850 A.2d 294, 299 (Del. 2004)(quoting *Mason v. Rizzi*, 2004 WL 439690, at *4 (Del.)).

³³*Daubert*, 509 U.S. at 590-94; see *General Motors Corp. v. Grenier*, 2009 WL 2581722, at *8 -9 (Del. 2009).

agencies. He participated in and directed ongoing NCAVC violent crime research and development projects such as the Crime Classification Manual, the Child Killer-Infant Abductor, and Serial Rapist studies. He has provided analyses of cases involving: homicide, sexual assault, child abduction and molestation, arson, bombing, extortion, product tampering, stalking, workplace violence, domestic and international terrorism, and threat assessment.

Mardigian currently is Executive Vice President and violent crime consultant with the Academy Group, Inc., a privately-owned forensic behavioral science firm. He has lectured extensively in the United States and abroad concerning violent crime assessment, interview and interrogation tactics, subject motivation, offender characterization, and threat assessment. Mardigian has offered expert witness testimony on crime analysis issues in numerous jurisdictions.

Relevance

Crime scene analysis clearly is relevant in this case, as it is in all murder trials.

Reliability

Has the theory or technique been tested?

Mardigian conceded that the types of conclusions set forth in his report in this case have not been statistically or quantitatively tested. Based upon anecdotal feedback from law enforcement agencies assisted by Mardigian and his colleagues, he estimates that the violent crime scene analysis opinions provided are accurate about 80 or 85% of the time. Therefore, there is no basis to conclude that the theories and techniques actually have been tested.

Is there a known rate of error and are there controlling standards?

For the same reasons in response to the previous question, the answer must be that there are neither a known rate of error nor controlling standards.

Have the opinions been subjected to peer review and publication?

_____ Much has been published on the topic of crime scene analysis. The relevant peer group may be those trained in the processes and methodologies used by the FBI's National Center for the Analysis of Violent Crime and organizations such as the International Criminal Investigative Fellowship and the International Homicide Investigator's Association. However, there does not appear to be a peer-review process *per se*, as it is practiced in other scientific, technical or specialized fields.

Has the theory or technique enjoyed general acceptance within a relevant scientific community?

Based upon the expert's testimony and the case law discussing violent crime scene analysis, the court concludes that Mardigian's methodology may be consistent with other experts in the field. However, the record is not sufficient to make a definitive ruling.

Assisting the Trier of Fact

It is clear that the expert's well-organized report would provide a useful blueprint for the trier of fact to evaluate the crime scene evidence. However, that is not the test. The question is whether the testimony will help the jury understand the evidence or determine a fact in issue.

Mardigian opines that the murderer was not a stranger to the victims. The victims were attacked in a home, as opposed to a more high-risk public area. There was no evidence of forced entry or stolen items. The offender apparently spent considerable time at the crime scene in order to clean and remove evidence. The victims were removed from the scene in what may have been an attempt to delay discovery. The victims were transported in the minivan, with the back seat removed, which was kept in the attached garage. The bodies were partially

burned, using a gas can from the backyard storage shed to transport the accelerant. There was evidence of planning, including a murder weapon brought to the scene.

The Court finds that all of these facts may be understood and evaluated by average jurors.³⁴ Specialized knowledge and expert testimony are not necessary to enable the triers of fact to reach a conclusion whether or not the killer was someone who knew the victims.

Mardigian also states that much more force was used than necessary to kill the victims. He opines that such “overkill” indicates personalized anger and sustained aggression or rage. Whether or not the victims suffered trauma in excess of that necessary to kill is a subject more appropriate for the testimony of a medical expert. The conclusions that may be drawn from overkill arguably are not within the knowledge of the average person. Nevertheless, there is no basis to admit Mardigian’s conclusion because it does not meet the previously-discussed admissibility factors for reliability. The theory has not been tested or subjected to a peer review process, and there is no known rate of error or controlling standard.

Mardigian further concludes that by wrapping the victims’ heads inside plastic, the offender “depersonalized” them. Mardigian opines that depersonalization is an action taken by the murderer to obscure the victim’s

³⁴See *Wheat v. State*, 527 A.2d 269, 272 (Del. 1987).

identity so that the murderer does not have to look at what has been done.

However, Mardigian also stated that depersonalization has the practical purpose of minimizing blood loss, or smearing, as bodies are moved. This issue of depersonalization also does not appear to be reliable because it has not been tested, subjected to a peer review process, and there is no known rate of error or controlling standard.

Unfair Prejudice, Confusion, Potential to Mislead the Jury

Evidence that is not sufficiently reliable, and will not assist the jury in determining a fact in issue, is *a fortiori* unfairly prejudicial. Mardigian's reasoning and conclusions are largely within the province of the average and reasonable juror. The evidence underlying the proffered testimony would not be particularly confusing. In the absence of expert testimony, the trier of fact may apply its common sense and life experience to accept or reject the conclusions argued by the State.

CONCLUSION

As the gatekeeper of the admissibility of expert testimony, the Court holds that the State's proffered crime scene analysis testimony may not be presented to the jury in the trial of this case. Mardigian is qualified and the evidence is relevant. However, the opinions have not been quantifiably tested, there are no

known error rates or controlling standards, the theories and techniques have not been subject to the scrutiny of peer review, and it is unclear whether the opinions are those generally accepted by the relevant community. As such, the opinions are not sufficiently reliable to be admitted at trial. The conclusions desired by the State may be accepted, or rejected, by average jurors using their collective knowledge, experience, and common sense, after considering the evidence.

THEREFORE, Defendant Clifford Wright's Motion to Exclude the Testimony of R. Stephen Mardigian is hereby **GRANTED.**

IT IS SO ORDERED.

The Honorable Mary M. Johnston